No. 89-783

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Petitioner,

v.

TRANS WORLD AIRLINES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITIONER'S REPLY BRIEF

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A. TWA's Efforts To Distinguish This Court's Decision In *Price-Waterhouse* Are Based Upon Distortion Of Both That Decision And This Case.

TWA has chosen to mischaracterize IFFA's claim of impermissible sex-motivated bargaining as a "comparable worth" claim (Resp. 17).[1] Perhaps the mischaracterization—in view of the disfavor with which this Court has viewed the notion of "comparable worth", *County of Washington v. Gunther*, 452 U.S. 161 (1981)—is but a smoke screen improperly interjected solely to divert focus away from the real issue. As the district court noted, "IFFA has not attempted to prove a comparable worth case" (A. 64). This is a case involving the RLA § 2, First[2] obligation to exert every reasonable effort to make agreement, wherein there is *direct evidence* that TWA intentionally insisted on and imposed greater salary and work rule concessions on women because of their perceived status.

TWA ignores the record. In the critical negotiation between Icahn and IFFA, IFFA's principal negotiator said to Icahn:

> The IAM does not only represent skilled employees. *Assume* that, in fact, flight attendants are not as skilled as *mechanics*. There are other work groups within this group [the IAM][3] who you are agreeing

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[1] Respondent TWA's Brief in Opposition to the Petition for Certiorari is referred to as "Resp. ——"; the Petition for Certiorari is referred to as "Pet. ——". The Appendix to the Petition for Certiorari in this case is referred to as "A. ——"; IFFA's Appendix submitted in its appeal to the Eighth Circuit is referred to as "App. ——".

[2] Railway Labor Act, 45 U.S.C. § 152, First.

[3] TWA argues that IFFA's [non-existent] comparable worth theory is disproved by a comparison to the predominantly male pilots. First of all, TWA compares the pilot wage cut *not* with

> to a 15 percent cut for who are not as skilled as flight attendants,[4] either comparably skilled or lesser skilled . . . [*W*]*hy would you agree to a 15 percent cut for a janitor and demand more from a flight attendant when we are paid about the same*?

Icahn answered the question:

> *A janitor is a breadwinner. He probably has got a family at home to support . . .* [*Y*]*ou girls* [*or stewardesses*] *. . . you are second incomes, and you don't need the money.* (App. C at 0666-67, emphasis supplied).

This *is* the testimony specifically credited by the district court (A. 18). Thereafter, and as found by the court, Icahn directed TWA's bargaining with IFFA, ordered

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the Flight Attendant cut *actually imposed* (22 percent)—but rather with a *temporary and withdrawn* offer of a lesser Flight Attendant wage cut. More importantly, TWA ignores its massive demands for work rule changes (over and above pay cuts) maintained and actually implemented against Flight Attendants. These work rule changes not only eliminated jobs but represented $56-66 Million in labor savings extracted from Flight Attendants over and above wage cuts (Pet. 5). TWA acknowledged $30-40 Million in work rule changes, over and above pay cuts (Resp. 6). Moreover, TWA ignores the fact that it offered "snapbacks" to the IAM and ALPA in exchange for the salary concessions; it refused to grant a "snapback" to Flight Attendants (Pet. 4, n.3).

Worth noting as well, and contrary to its assertion (Resp. 6), TWA did *not* offer—and the district court did *not* find that TWA offered—a "no furlough agreement". Adopting IFFA testimony, the court found that IFFA specifically asked Icahn if he was proposing a no furlough agreement, and Icahn replied "not the kind you mean." The court added, "while it *cannot* be concluded that Icahn casually made a 'priceless proposal' as *TWA contends*, it will not be inferred that the statement lacked substance." (A. 29-30, emphasis supplied). Indeed, as revealed by credited IFFA testimony (App. B at 0521-23 and App. C at 0722-27) and the notes of Icahn's/TWA's attorney (P. Ex. 546, App. H at 1869-70), Icahn said that work which then required 6000 Flight Attendants would now, with the new work rules, require only 3500.

[4] Indeed mechanics, the skilled segment of employees represented by the IAM, comprise a relatively small minority of the many job classifications represented by the IAM.

the withdrawal of previous and lesser TWA demands and the introduction of more onerous concessionary demands—which were indeed implemented (Pet. 4-7). As is clear, and noted by the court below, Icahn *was* the decision maker.

For that reason, and *because* his remarks *were* made in the critical phase of his negotiation with IFFA and were a direct response to the question asking why he was demanding more from Flight Attendants, they cannot be brushed aside as mere shop talk or "remarks at work" as maintained by TWA (Resp. 16).[5] Made by Icahn himself in direct discussion with IFFA, and repeated thereafter in the course of further such discussions (Pet. 4, at n. 4), they constitute direct admissions of unlawful motivation[6] prohibited by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* The question presented in IFFA's Petition is whether, absent proof by affirmative defense, such action can nonetheless be held

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[5] TWA's citation (Resp. 16) to *Gagne v. Northwest National Ins. Co.*, 50 F.E.P. (BNA) 601, 605 (881 F.2d 309) (6th Cir. 1989), is wholly inapposite. In *Gagne*, unlike this case, the employer introduced evidence of nondiscriminatory motivation for its adverse action against plaintiff: an earlier series of verbal and negative admonitions concerning work performance; a written reprimand; a written reproach; an oral warning; a critically negative written performance evaluation; and probation. This was sufficient evidence to rebut plaintiff's *prima facie* case of age discrimination. Plaintiff attempted to meet her "burden of persuasion" on the basis of an earlier "solitary remark" made by a supervisor—a remark characterized by plaintiff herself as "isolated", as "made facetiously" and in a meeting attended by a number of employees and "not directed at any particular individual." That solitary remark was held insufficient, not as a "remark at work" under *Price-Waterhouse v. Watkins*, —— U.S. ——, 109 S.Ct. 1775 (1989), but rather on other grounds involving different considerations under other precedents. *Gagne* at 602, 604.

[6] An asserted reason for adverse job action, "that *a woman is to make less* than a man because *a woman does not have to support a family*", has even recently been again held to support a claim for violation of Title VII. *Schnellbaecher v. Baskin Clothing Co.*, 887 F.2d 124, 129-30 (7th Cir., October 5, 1989).

consistent with national labor policy concerning the *collective* establishment of wages, hours and working conditions as embodied in the Railway Labor Act.

B. TWA Has Misstated Facts. Under The Correct Legal Standard As Applied To The Facts Of This Case, IFFA's Petition Should Be Granted.

As set forth in IFFA's Petition, the district court's own findings of fact compel the conclusion that TWA (1) breached its § 2, First obligation to exert every reasonable effort to reach agreement and (2) caused the strike. It imposed greater salary and work rule concessions on Flight Attendants because they were perceived as "second incomes" rather than "breadwinners" (Pet. 4, 8-9, 13-19). It engaged in numerous instances of unjustified refusal to supply relevant information or answer relevant questions (Pet. 5-6, 10, 23-27). In addition, the district court generally accepted IFFA's other various claims of misconduct in bargaining [including, *inter alia*, written agreement with ALPA concerning concessions to be obtained by TWA from IFFA, thereby establishing rigidity in TWA's bargaining with IFFA; direct dealing with employees over employment terms; insistence on predictably unacceptable proposals (A. 14, 54-55); threats to liquidate the airline if IFFA prevailed (App. B at 0522; App. C at 0722, 0805-07; P. Ex. 546, App. H at 1869-72; P. Ex. 279-A, App. G at 1604-07; App. E at 1108-09; and D. Ex. 6F, App. L at 2746, 2758); disparagement of IFFA and its leadership (*e.g.*, P. Ex. 279-A, App. G at 1604-07); and implementation of changes not subjected to negotiation] (Pet. 3, 6, 10-11, 27-30).

As to TWA's assertions of other "facts" (many of which are not found in the decision below or the record), Rule 52(a), FRCP provides that "[f]indings of fact . . . shall not be set aside unless clearly erroneous, and *due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses*" (emphasis supplied).[7] Factual findings are clearly erroneous *if prem-*

[7] The district court credited IFFA's testimony in virtually all instances (Pet. 4, n. 4).

ised upon a misconception of the law, or if the reviewing court on the entire record evidence is left with a definite and firm conviction that a mistake has been made. United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948); *Danzl v. North St. Paul-Maplewood-Oakdale Indep. School Dist. No. 622*, 706 F.2d 813, 818 (8th Cir. 1983). Questions of law are not subject to this standard. *Western Contracting Corp. v. The Dow Chemical Corp.*, 664 F.2d 1097 (8th Cir. 1981).[8] Although a court's factual findings are entitled to great deference, special deference is accorded to those findings based upon determinations *regarding the credibility of witnesses.* Both Rule 52(a) and Rule 32(a)(3)(E) emphasize the importance of *oral testimony. See also, Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 501 (1984) ("The same 'clearly erroneous' standard applies to findings based on documentary evidence as to those based entirely on oral testimony . . . but the presumption [as to their correctness] has lesser force in the former situation than the latter").

Measured against proper legal standards, and in light of the lack of TWA evidence except for self-serving deposition designations not subjected to cross-examination on rebuttal, the following are examples of the court's erroneous findings based on misconceptions of law or on mixed findings of law and fact:

(1) The court, without evidence, concluded that Icahn's breadwinner statements could not reveal motivation as it would thereby reflect implausible adherence, on the part of a capitalist and hard-boiled corporate raider, to a Marxist or utopian distribution scheme (Pet. 8-9, 14-16).

(2) The court found many instances of unjustified refusal to provide relevant information; yet the

[8] Unlike this case, the vast majority of cases wherein the standard is considered and applied are those wherein the court has had full opportunity to hear the oral testimony of both plaintiff's *and defendant's* witnesses.

court, again without evidence, concluded that this denial did not support a finding in IFFA's favor because no information sought "would have filled the chasm" between TWA demands and IFFA offers (Pet. 10).

(3) The court generally accepted IFFA's other, various claims of misconduct in bargaining; it concluded that such misconduct did not violate the RLA because "such *misconduct would [only] have been directed toward tricking or coercing IFFA into making a bad bargain*" (Pet. 10-11).

(4) The court noted that it was *prohibited* from "sitting in judgment upon the substantive terms of a proposed collective bargaining agreement"; it nonetheless determined that "the sole cause of impasse" was the wide divergence between TWA demands and IFFA offers, and framed as the basic factual issue whether TWA's ultimate demands had been shown to be beyond the range of reasonableness (Pet. 10-11).[3]

Except for its determinations that TWA refused to provide relevant information, engaged in misconduct best described as attempting to trick or coerce IFFA into a bad bargain, maintained predictably acceptable proposals, and entered into an agreement with ALPA tending to establish rigidity in TWA's dealings with IFFA in ways that may contravene public policy—the court, in its opinion, did not otherwise address the question of TWA's *effort* under § 2, First.

Within the limited space available, additional comments concerning TWA's Brief in Opposition are warranted.

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[3] The court thus limited its dispositive inquiry on the substance of the demands themselves, ignoring the process, manner and method by which those demands were *maintained*; § 2, First treats not with substance of positions taken, but with *effort* (*i.e.* the process, method and manner utilized) in reaching agreement.

(1) Contrary to TWA (Resp. 4, n. 4), TWA did *not* supply IFFA with the type of information dealt with in *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). *Truitt* dealt with corporate books and records, *i.e.* the basic, source proof of position; the limited information provided by TWA contained only unsubstantiated, unproven statements and assertions. Moreover, the "extensive financial data" referred to by TWA (Resp. 4) was *not* the information requested by IFFA, relating to TWA's specific proposals themselves.

An analysis of *Truitt* reveals TWA's breach of its statutory duty. In *Truitt*, the employer advanced a claim of inability to pay; the union requested *proof* of *that* claim, *i.e.* corporate books and records. TWA advanced the claim of a need for concessions in salary and work rules; as to work rules, it claimed that its demands would reduce 581 Flight Attendant heads, *i.e. jobs*. IFFA requested information (P. Ex. 50, App. F at 1277) as to *proof*, *i.e.* the calculation and method of calculation [10];

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[10] TWA's calculations and method of calculating *are* the *proof* of its claims required by *Truitt*. TWA had advised IFFA that its demands would reduce Flight Attendant headcount (jobs) by 581 heads; it provided a breakdown as to the *number* of heads to be lost from each of the generally numbered proposals—but not from the many sub-proposals (TWA negotiating notes, App. I at 1977). IFFA questioned this information and feared that the proposals would cost even *more* jobs. For example, TWA's Proposal No. 4, Flex Cap, would require up to 10 more flight hours per month for over 5,000 employees (50,000 hrs./mo.)—and was said to cost only *45 jobs*; its Proposal No. 11, Reserve Spread, would yield a maximum of 10 additional hours per month for some 550 reserves (5500 hrs./mo.)—and reduce 17 jobs (App. B at 0588-89; P. Ex. 140, App. G at 1467). The need for proof by explanation of calculation is readily apparent. Under the Flex Cap proposal, 5,000 employees x 10 hrs./mo. = 50,000 hrs./mo.; this increased flying (50,000 hours) ÷ 85 (hrs./mo.) could reduce 588 (and *not* 45) heads. That disclosure of the calculations and method of calculations was required is further revealed by the fact that TWA's internal documents—discovered only in trial—reflected estimates of headcount reduc-

TWA *refused* that proof (A. 25)—insisting, in effect, on blind trust by IFFA.[11]

(2) TWA's reliance on *Pacific Fruit Express Joint Protective Bd. v. Union Pacific*, 826 F.2d 920 (9th Cir. 1987) *cert. denied*, 108 S.Ct. 2845 (1988) is misplaced. That case involved a discovery request *in a minor dispute* (grievance arbitration), over which—unlike a *major dispute* (the making of agreement) involved in *this* case—federal courts are without jurisdiction; in *minor disputes*, of course, jurisdiction rests with the appropriate Adjustment Boards. *Consolidated Rail Corp. v. RLEA*, —— U.S. ——, 109 S.Ct. 2477, 2480-81 (1989).

(3) TWA twice references Icahn's passionate eagerness to make an agreement (Resp. 3, 7). IFFA does not contest that Icahn was passionately eager for the terms he had dictated. But nothing less was considered. In the final hours before TWA's unilateral implementation, and the IFFA strike, Icahn threatened to liquidate the airline, told IFFA he only needed 3,500 employees to operate the airline, said that if Flight Attendants struck they would not come back and told IFFA's negotiators he was not going to negotiate on this deal (App. B at 0521-23; App. C at 0722-25; and P. Ex. 546, App. H at 1869 ff). In deposition testimony, Icahn testified that IFFA "never went over 50 [million in concessions] so it was sort of silly to even discuss [a reduced TWA proposal]" (Icahn Depo., App. J at 2126-28). Icahn also explained his refusal to compromise:

> . . . *I am a seasoned negotiator*, . . . the only way I was going to get a deal, if there was

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tions, from its demands, ranging from 722 to 839 (Bryner Depo., App. K at 2323-24, 2378).

[11] TWA made and updated these calculations throughout the course of negotiation (Hoar Depo., App. K at 2558-61; Bryner Depo., Ex. H, App. K at 2382-85; Bryner Depo., Ex. G, App. K at 2378; Bryner Depo., App. K at 2332-33).

> [a] deal to be made, *look, this is it, I am going to give you a 17% reduction* [*referring to the earlier reduced salary demand*], *and that is it. That is as far as we go.* I have been saying all along *to have credibility . . . we can't go any lower, that is it. That is my way of negotiating.*
>
> *It would be silly for me—that would undermine my credibility to come down—she goes up a few million; for me to come down a few million would undermine my credibility.* (Icahn Depo., App. J at 2129-30, emphasis supplied).

(4) In its efforts to rely on worsened financial condition and prospects (Resp. 6), TWA ignores facts. TWA's President, Richard Pearson, confirmed that with $50 Million from Flight Attendants, TWA's profitability was assured in 1986 (Pearson Depo., App. J at 2294-96). Pearson acknowledged that, with savings from other groups, a $40-$50 Million concession from Flight Attendants would have yielded TWA a total of $300 Million in labor savings—which was TWA's goal (Pearson Depo., App. J at 2278-79, 2292). IFFA indeed offered some $50 Million in concessions prior to TWA's resort to self-help (App. B at 0569-70; Icahn Depo., App. J at 2126-28). In addition to Icahn's admission that his notion of his *credibility* prompted TWA's refusal to compromise (*supra*), Pearson likewise admitted that TWA insisted on even more from IFFA because to do otherwise "would have destroyed us with the other employees of the Company" who had made their expectations known as to concessions to be obtained from Flight Attendants (Pearson Depo., App. J at 2297-2301).

(5) The court's conclusion that TWA's misconduct did not cause the impasse (A. 28, Resp. 13) is inextricably linked to its conclusion that TWA did not violate § 2, First. Reversal of the latter removes

the underpinnings and compels reversal of the former as well. An unfair labor practice strike *is* one caused or promoted, in whole or *in part*, by an employer's unfair labor practices. *NLRB v. Col. Trib. Publ. Co.*, 495 F.2d 1384 (8th Cir. 1974). Once unfair labor practices have been established and an impasse and strike have occurred, the employer, *at the very minimum*, has the burden, by way of affirmative defense, to prove that the strike would have occurred even absent its illegal conduct (Pet. 28-29). Indeed, the Seventh Circuit has held that a strike in such circumstances must be considered, *as a matter of law*, an unfair labor practice strike (rejecting a lesser standard otherwise applicable in mixed motive cases as referenced in Pet. 28-29). *Northern Wire Corp. v. NLRB*, 887 F.2d 1313, 1319-21 (7th Cir. 1989). Important questions are thus raised in this case by virtue of the courts' failure to impose *any* burden upon TWA in the face of its misconduct, the impasse and the strike.

Respectfully submitted,

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